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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

**IN RE INSULIN PRICING
LITIGATION**

Civil Action No. 17-cv-699 (BRM)(LHG)

ORAL ARGUMENT REQUESTED

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS
ACTION COMPLAINT (COUNTS 7-60)**

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PRELIMINARY STATEMENT

Counts 7 through 60 of the Consolidated Amended Class Action Complaint (“CAC” or the “complaint”) are nothing more than threadbare recitals of the elements of a bevy of state consumer protection laws. These causes of action expressly rely on the same allegations that underlie plaintiffs’ RICO claims, and fail for the same reasons that plaintiffs’ RICO claims fail. Fundamentally, all of plaintiffs’ claims depend on the assertion that they pay too much for insulin because they do not receive the benefit of rebates that the PBMs negotiate from defendants. *See, e.g.*, CAC ¶¶ 21-22. But, as defendants demonstrate in their joint motion to dismiss the RICO claims (“RICO brief” or “RICO Br.”), none of the allegations in plaintiffs’ 200-page-long complaint come close to plausibly suggesting that defendants have done anything fraudulent, unfair, or unconscionable. Counts 7 through 60 should all be dismissed for that reason alone.

These claims fail in their entirety for other reasons as well. First, the complaint does not plead facts showing how defendants violated each of the laws asserted in these counts, but instead offers cursory recitations of the elements of each statute. Formulaic recitals of a laundry list of claims, without any attempt to tether the claims to the facts alleged, are plainly insufficient to withstand a motion to dismiss. *See, e.g., McGarvey v. Penske Auto. Grp., Inc.*, 639 F. Supp. 2d 450, 465-66 (D.N.J. 2009). Second, all of the claims require a showing of proximate

causation. *See, e.g., Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). As shown in the RICO brief, plaintiffs have not demonstrated proximate causation, which is fatal to all of their state law claims as well. Third, all of plaintiffs' state law claims sound in fraud and therefore should be dismissed for failure to comply with the heightened pleading standards of Rule 9(b). *See, e.g., DeGennaro v. Am. Bankers Ins. Co. of Fla.*, 2017 WL 2693881, at *5 (D.N.J. June 22, 2017) (Martinotti, J.). Finally, all of plaintiffs' state law claims should be dismissed because plaintiffs have alleged damages that are speculative and not ascertainable.

Beyond the foregoing arguments for dismissing all of Counts 7 through 60, there are additional, independent grounds for dismissing many of these claims.¹

- For the eighteen jurisdictions where no plaintiff resides, the claim should be dismissed for lack of Article III standing.
- Plaintiffs' claims fail as to certain defendants under a number of state laws because no named plaintiff from the state has purchased any of those defendants' products.
- Eight of the statutes prohibit class action claims.

¹ Appendices A and B set out the claims as to which each of the following grounds for dismissal applies.

- Six of the claims should be dismissed because the statutes require plaintiffs to have directly purchased products from defendants or otherwise be in privity with defendants.
- Six of the claims should be dismissed due to plaintiffs’ failure to plead reliance, which is a required element of certain statutes.
- Five of the statutes require not only that an alleged victim be located in the state, but also require specific allegations that misconduct occurred within the state, which plaintiffs fail to plead.
- Three of the claims should be dismissed due to plaintiffs’ failure to comply with procedural requirements under the statutes at issue.

ARGUMENT

I. All of Plaintiffs’ State Law Claims Should Be Dismissed

A. All the Claims Fail Because Plaintiffs’ Allegations Fail to Show Fraudulent, Unfair, or Unconscionable Conduct

At its core, plaintiffs’ theory of liability is that they paid “excessive” prices for insulin because they did not receive the benefit of rebates that manufacturers pay to PBMs. *See, e.g.*, CAC ¶¶ 21-22; *see also* RICO Br. at pp. 13-20 (discussing plaintiffs’ allegations).² It is clear, however, that none of the allegations in

² “RICO Br.” refers to Defendants’ Memorandum of Law in Support of Motion to Dismiss the Consolidated Amended Class Action Complaint (Counts 1- (...continued)

plaintiffs' complaint come close to plausibly suggesting that defendants have done anything fraudulent, unfair, or unconscionable. For those reasons, as well as the other reasons set forth in the RICO brief, all of plaintiffs' claims should be dismissed. *See* RICO Br. at pp. 26-45; *see also, e.g., Bonilla v. Volvo Car Corp.*, 150 F.3d 62, 71-72, 76 (1st Cir. 1998) (reversing jury verdict and explaining that while "large markups and differential pricing may seem unfair to consumers," such conduct "is not itself fraud"); *see also, e.g., Kantner v. Merck & Co., Inc.*, 2007 WL 3092779, at ¶ 17 (Ind. Super. Ct. Apr. 18, 2007) (rejecting argument that consumer "allegedly paid more than she 'should' have as a result of the alleged acts or omissions of Merck even though she doesn't allege any injuries or additional expenses as a result of taking Vioxx"); *Ford Motor Credit Co. v. Majors*, 2005 WL 1021551, at *7 (Minn. Ct. App. May 3, 2005) (a "consumer engaged in an arm's length transaction with a retail seller is not entitled to assume that the retail seller is not making a profit" (citation omitted)); *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1422 (5th Cir. 1993) ("[Louisiana's Unfair Trade Practices and Consumer Protection Law] does not forbid a business to do what everyone knows a business must do: make money.").

(continued....)

6), dated March 9, 2018. As explained in that brief, the Court should dismiss Counts 7-60 upon dismissal of Counts 1-6. *See* RICO Br. at p. 4 & n.3.

**B. All the Claims Fail Because They Are Nothing More Than
Cursory Recitations of the Elements of Each Statute**

Counts 7 through 60 should also be dismissed because the complaint merely offers threadbare recitations of the statutes asserted, and does not tie the complaint's generic allegations to the particular requirements of those statutes. Courts in this Circuit routinely dismiss claims that are pleaded in this cursory manner. *See, e.g., McGarvey*, 639 F. Supp. 2d at 465-66 (dismissing state consumer protection claims where “[p]laintiffs do not . . . explain how the fifteen listed statutes apply to the facts of this case”), *vacated in part on other grounds on reconsideration*, 2010 WL 1379967 (D.N.J. Mar. 29, 2010); *see also In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 2017 WL 4642285, at *14 (E.D. Pa. Oct. 17, 2017) (dismissing state consumer protection law claims where, after “[p]eeeling away the allegations that are no more than legal conclusions,” the claims “contain no well-pled factual allegations” as to how defendants violated each law).

C. All the Claims Fail to Plead Proximate Causation

Although there is some variance between the elements of the different state consumer protection laws invoked in the complaint, every statute requires a plaintiff to allege that the defendant's purportedly wrongful conduct proximately caused the injury suffered by the plaintiff. *See, e.g., In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526, 546 (N.D. Tex. 2014)

(dismissing state consumer protection claims brought under thirty-five statutes because “each consumer protection statute at issue requires, in some form or another, that the defendant’s unlawful conduct proximately cause[d] the plaintiff’s complained-of-harm”); *Martinelli v. Petland, Inc.*, 2010 WL 376921, at *8-9 (D. Ariz. Jan. 26, 2010) (dismissing claims brought under state consumer protection statutes because plaintiffs’ “conclusory allegations of causation” were inadequate); *see generally Lexmark Int’l*, 134 S. Ct. at 1390 (courts should “generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute”).

As defendants explain in the RICO brief, plaintiffs have failed to allege proximate causation for at least two reasons. First, there are multiple entities on the distribution chain between plaintiffs and defendants—and indeed, plaintiffs made payments based on prices that were not set by defendants. *See* RICO Br. at pp. 26-29. Second, there is no causal link between the putative misrepresentations and plaintiffs’ alleged injury. *See id.* at pp. 43-45. Thus, just as plaintiffs’ RICO claims fail for lack of proximate causation, plaintiffs’ state law claims also fail.

D. All the Claims Fail to Comply with Rule 9(b)

To satisfy the “stringent pleading restrictions” of Rule 9(b), a plaintiff cannot rely on “generic references” to allegedly fraudulent statements. *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007). Instead, as defendants explain

in the RICO brief, a plaintiff must plead with particularity the circumstances of the alleged fraud. *See* RICO Br. at pp. 20-21.

As established in the RICO brief, plaintiffs’ allegations—all of which sound in fraud—are not pleaded with the particularity required by Rule 9(b). Plaintiffs fail to identify any purportedly “misleading statements” or “misrepresentations” made by defendants. *See id.* at pp. 30-34. Plaintiffs likewise fail to plead Counts 7 through 60 with particularity. Instead, they attempt to support those counts with conclusory allegations (CAC ¶¶ 445-458) regarding defendants’ alleged conduct. *See, e.g., id.* ¶ 447 (alleging that defendants made “false or misleading statements regarding the real prices” of insulin drugs, but nowhere specifying what the allegedly “false or misleading statements” were); *id.* ¶ 450 (alleging generally that defendants engaged in “pricing deceit”).³ And each of Counts 7 through 60 incorporates by reference the previous (and insufficiently particularized) allegations appearing earlier in the complaint, without adding further detail. *See, e.g., id.* ¶¶ 459, 468. Because Counts 7 through 60 are all based on the same underlying allegations of fraudulent conduct, they are all subject to dismissal for failure to satisfy Rule 9(b). *See, e.g., DeGennaro*, 2017 WL 2693881, at *5

³ As explained in the RICO brief, the specific statements in the complaint attributed to defendants expressly represent that there is a difference between the defendants’ list price and the net price that defendants receive after the payment of PBM rebates. *See* RICO Br. at pp. 31-32.

(holding that “fraud based claims are subject to [the] heightened pleading standard” of Rule 9(b)).

E. All the Claims Fail Because Plaintiffs’ Alleged Damages Are Speculative

As explained in the RICO brief, plaintiffs’ state law claims rely on an amorphous “price inflation” theory. *See* RICO Br. at pp. 51-52. Plaintiffs allege that they paid “excessive” prices for analog insulin, but they have not provided the Court with any basis for determining what a theoretical “fair price” for insulin products should be. This failure is also fatal to plaintiffs’ state law claims. *See, e.g., Prohias v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1336-37 (S.D. Fla. 2009) (holding that determination of a “hypothetical price [for drugs], even with expert proof, is too speculative to be the premise of an ‘actual injury’”); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 660 F. Supp. 2d 94, 100-01 (D. Me. 2009) (potential damages are too speculative where fact-finder would be required to “guess at a possible monetary value” of loss (citation omitted)); *Kantner*, 2007 WL 3092779, at ¶¶ 17-19 (holding that “hypothetical market price damages” are not cognizable).

II. Certain State Law Claims Should Be Dismissed for Independent Reasons

A. Eighteen of the Claims Lack a Plaintiff with Article III Standing

“Plaintiffs have the burden to establish standing.” *Winer Family Trust v. Queen*, 503 F.3d 319, 325 (3d Cir. 2007). Carrying this burden requires a plaintiff

to allege “facts that affirmatively and plausibly suggest that the pleader has the right he claims.” *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243-44 (3d Cir. 2012) (internal quotation marks and citation omitted). Moreover, it is well settled that “even named plaintiffs who represent a class must allege and show that they personally have [standing].” *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

In a class action, moreover, named plaintiffs must have standing as to each claim in the complaint. *See, e.g., In re Schering Plough Corp.*, 678 F.3d at 245. The threshold standing determination may not be postponed to class certification. *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 360, 366-67 (3d Cir. 2015) (“class representatives must meet Article III standing requirements the moment a complaint is filed”).

Accordingly, plaintiffs must establish standing as to each of the state laws they seek to assert by alleging facts showing that they suffered injury in each state. *See, e.g., Plumbers Local Union No. 690 Health Plan v. Apotex Corp.*, 2017 WL 4235773, at *13 (E.D. Pa. Sept. 25, 2017) (holding that plaintiffs “lack standing . . . to raise state law claims for states where they are not located and where they did not purchase any drugs or reimburse their members for the purchase of any drugs”); *In re: Niaspan Antitrust Litig.*, 2015 WL 8150588, at *3 (E.D. Pa. Dec. 8, 2015) (citing decisions holding that plaintiffs “lack standing to

bring claims on behalf of putative classes under the laws of states where no named plaintiff is located and where no named plaintiff purchased the product at issue”).

The complaint includes eighteen counts under the laws of states in which no named plaintiff resides or is alleged to have made any purchases.⁴ The Court should dismiss those claims for lack of Article III standing. Similarly, the Court should dismiss each plaintiff’s state law claims for states in which the plaintiff does not reside or is alleged to have made any purchase.⁵

B. Certain Claims Fail as to One or More Defendants Because No Plaintiff Purchased That Defendant’s Products

Plaintiffs also lack standing to pursue claims against certain defendants because none of them suffered an alleged injury in a given state from that defendant’s products. *See Lieberman v. Johnson & Johnson Consumer Cos., Inc.*,

⁴ Those are counts 7 (Alabama), 8 (Alaska), 14 (Connecticut), 15 (Delaware), 16 (District of Columbia), 20 (Hawaii), 29 (Maryland), 39 (New Hampshire), 43 (North Carolina), 44 (North Dakota), 46 (Oklahoma), 48 (Pennsylvania), 49 (Rhode Island), 50 (South Carolina), 51 (South Dakota), 56 (Virginia), 58 (West Virginia), and 60 (Wyoming).

⁵ Each plaintiff asserts claims under the state consumer protection laws of all fifty states and the District of Columbia. CAC ¶¶ 413-818. It is well settled, however, that plaintiffs “lack standing . . . to raise state law claims for states where they are not located and where they did not purchase any drugs or reimburse their members for the purchase of any drugs.” *Apotex Corp.*, 2017 WL 4235773, at *13. Accordingly, none of the plaintiffs has standing to sue under any state law other than the state of their residence. *See In re Flonase Antitrust Litig.*, 692 F. Supp. 2d 524, 533 (E.D. Pa. 2010) (“Case law supports the position that Plaintiffs suffered injury and have standing in states where they purchased a drug or reimbursed their members for purchases of a drug” (collecting cases)).

865 F. Supp. 2d 529, 537 (D.N.J. 2011) (“Because Plaintiff has not alleged that she purchased or used two of the four [] products at issue here, Plaintiff cannot establish an injury-in-fact with regard to those products.”); *Green v. Green Mountain Coffee Roasters, Inc.*, 279 F.R.D. 275, 280 (D.N.J. 2011) (dismissing claims as to products that putative class action plaintiff “neither purchased nor used” (citation omitted)). Thus, for each state as to which no plaintiff alleges the purchase of relevant products⁶ from one or more of the defendants, the Court lacks subject matter jurisdiction to adjudicate any claim under that state’s law against the particular defendants.⁷ The claims that should be dismissed are:

- Lilly: Counts 10 (Arkansas), 22 (Illinois), 26 (Kentucky), 34 (Mississippi), 41 (New Mexico), 47 (Oregon), 52 (Tennessee), and 55 (Vermont).⁸

⁶ The relevant products are those set forth in plaintiffs’ proposed class definition. *See* CAC ¶ 279.

⁷ Courts in this District have held that standing may be established by individual representatives as to products those individuals did not purchase, but only if all of the claims are brought against the same defendant. *See, e.g., In re L’Oreal Wrinkle Cream Mktg. and Sales Practices Litig.*, 2013 WL 6450701, at *4 (D.N.J. Dec. 9, 2013).

⁸ *See* CAC ¶¶ 43-44 (Plaintiff Brewster, the only Arkansas plaintiff, does not allege having paid for any Lilly product); *id.* ¶¶ 27-28, 101-102 (Illinois plaintiffs Arnold and Levett do not allege having paid for any Lilly product); *id.* ¶¶ 129-130 (Plaintiff Ramsey, the only Kentucky plaintiff, does not allege having paid for any (...continued)

- Novo Nordisk: Counts 13 (Colorado), 30 (Massachusetts), 35 (Missouri), 38 (Nevada), and 57 (Washington).⁹
- Sanofi: Counts 27 (Louisiana), 28 (Maine), 34 (Mississippi), 52 (Tennessee), and 57 (Washington).¹⁰

(continued....)

Lilly product); *id.* ¶¶ 161-162 (Plaintiff Weir, the only Mississippi plaintiff, does not allege having paid for any Lilly product); *id.* ¶¶ 29-32 (New Mexico plaintiffs Frank and Roseanna Barnett do not allege having paid for any Lilly product); *id.* ¶¶ 119-120, 163-164 (Oregon plaintiffs Palmer, Kim Wallan, and Jim Wallan do not allege having paid for any Lilly product); *id.* ¶¶ 125-126 (Plaintiff Phillips, the only Tennessee plaintiff, does not allege having paid for any Lilly product); *id.* ¶¶ 57-58 (Plaintiff Devins, the only Vermont plaintiff, does not allege having paid for any Lilly product).

⁹ See CAC ¶¶ 61-62 (Plaintiff Douthit, the only Colorado plaintiff, does not allege having paid for any Novo Nordisk product); *id.* ¶¶ 25-26, 45-46, 59-60, 71-72 (Massachusetts plaintiffs Appleby, Chaires, Doe, and Girard do not allege having paid for any Novo Nordisk product); *id.* ¶¶ 35-36 (Plaintiff Bentele, the only Missouri plaintiff, does not allege having paid for any Novo Nordisk product); *id.* ¶¶ 33-34, 133-134 (Plaintiffs Bauer and Saffran, the only Nevada plaintiffs, do not allege having paid for any Novo Nordisk product); *id.* ¶¶ 145-146 (Plaintiff Stanford, the only Washington plaintiff, does not allege having paid for any Novo Nordisk product).

¹⁰ See CAC ¶¶ 131-132 (Plaintiff Rushing, the only Louisiana plaintiff, does not allege having paid for any Sanofi product); *id.* ¶¶ 151-152 (Plaintiff Thompson, the only Maine plaintiff, does not allege having paid for any Sanofi product); *id.* ¶¶ 161-162 (Plaintiff Weir, the only Mississippi plaintiff, does not allege having paid for any Sanofi product); *id.* ¶¶ 125-126 (Plaintiff Phillips, the only Tennessee plaintiff, does not allege having paid for any Sanofi product); *id.* ¶¶ 145-146 (Plaintiff Stanford, the only Washington plaintiff, does not allege having paid for any Sanofi product).

C. Eight of the Claims Fail Due to Statutory Prohibitions on Consumer Class Actions

Under the Supreme Court’s opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), this Court should apply the statutory bars on class actions contained in eight state statutes and dismiss the class action claims brought under those statutes. As Justice Stevens reasoned in his controlling opinion in *Shady Grove*, federal courts should apply state procedural rules that “function as a part of the State’s definition of substantive rights and remedies.” *Id.* at 418 (Stevens, J., concurring).¹¹ Accordingly, the Federal Rules of Civil Procedure “cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.” *Id.* at 423.

Following *Shady Grove*, federal courts have held that they are “compelled to . . . apply the class action bar incorporated in [state] consumer protection laws,” and have dismissed class claims under eight of the state laws invoked by plaintiffs

¹¹ In *Shady Grove*, Justice Scalia wrote a plurality opinion for four justices, and Justice Stevens wrote a concurring opinion. Absent an opinion of the Court, lower courts are bound by the “position taken by those . . . who concurred . . . on the narrowest grounds.” *Davis v. Ace Hardware Corp.*, 2014 WL 688132, at *8 n.10 (D. Del. Feb. 21, 2014) (citation omitted). Most courts follow Justice Stevens’ concurrence in *Shady Grove*. See, e.g., *id.* (collecting cases); see also *Fraiser v. Stanley Black & Decker, Inc.*, 109 F. Supp. 3d 498, 505 (D. Conn. 2015).

here. *See, e.g., Delgado v. Ocwen Loan Servicing, LLC*, 2017 WL 5201079, at *10 (E.D.N.Y. Nov. 9, 2017). This Court should do the same and dismiss counts 7 (Alabama), 18 (Georgia’s FBPA), 26 (Kentucky), 27 (Louisiana), 34 (Mississippi), 36 (Montana), 50 (South Carolina), and 52 (Tennessee). *See, e.g., Delgado*, 2017 WL 5201079, at *9-11 (dismissing class claims under Alabama, Georgia, and Tennessee laws); *In re Target Corp. Customer Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154, 1164-66 (D. Minn. 2014) (“Plaintiffs cannot maintain a class action as to the alleged consumer-protection statutory violations in Alabama, Georgia, Kentucky, Louisiana, Mississippi, Montana, South Carolina, and Tennessee”); *see also Plaza 22, LLC v. Waste Mgmt. of La., LLC*, 2015 WL 1120320, at *2 (M.D. La. Mar. 12, 2015); *but see Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1337-38 (11th Cir. 2015) (holding that the Alabama statute’s prohibition on class actions did not apply).

D. Six of the Claims Fail Because Plaintiffs Are Not Direct Purchasers or Otherwise in Privity with Defendants

Under the consumer protection laws of six jurisdictions, a plaintiff may bring a claim only if he is in privity with the defendant and/or directly purchased a product from the defendant. As demonstrated in the RICO brief, plaintiffs have not alleged that they made any purchases directly from defendants. Instead, defendants sell their analog insulin to wholesalers, who in turn re-sell these products to pharmacies. Accordingly, plaintiffs’ claims should be dismissed under

the laws of jurisdictions that require plaintiffs to be in privity with and/or have directly purchased a product from the defendant. Those are counts 9 (Arizona), 16 (D.C.), 21 (Idaho), 26 (Kentucky), 30 (Massachusetts), and 55 (Vermont).¹²

E. Six of the Claims Fail Because Plaintiffs Do Not Plead Reliance

Plaintiffs have failed to plead how they relied on any allegedly misleading statements or acts of defendants. As explained in the RICO brief, plaintiffs' RICO claims fail because they do not (and cannot) allege that anyone relied on defendants' alleged misrepresentations in making their purchases of insulin. *See* RICO Br. at pp. 43-45 & n.26. This failure is fatal to plaintiffs' claims under the consumer protection laws of six jurisdictions that require a plaintiff to establish

¹² *See, e.g., Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 407 (9th Cir. 1992) (dismissing Arizona consumer protection claim where plaintiff and defendant were not in buyer-seller relationship); *Robinson v. Deutsche Bank Nat'l Tr. Co.*, 932 F. Supp. 2d 95, 102-03 (D.D.C. 2013) (dismissing D.C. consumer protection claim "[s]ince no transaction was consummated" between parties); *Taylor v. McNichols*, 243 P.3d 642, 662 (Idaho 2010) (affirming dismissal of Idaho consumer protection claims because "aggrieved party must have been in a contractual relationship with the party alleged to have acted unfairly"); *Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847, 854-55 (W.D. Ky. 2007) (explaining that "privity of contract [must] exist between the parties in a suit alleging a violation of the [Kentucky statute]" (citation omitted)); *John Boyd Co. v. Bos. Gas Co.*, 775 F. Supp. 435, 440 (D. Mass. 1991) ("[T]he existence of some contractual or business relationship between the parties [is] a precursor to liability under [Massachusetts consumer protection law]."); *Otis-Wisher v. Medtronic, Inc.*, 616 F. App'x 433, 435 (2nd Cir. 2015) (affirming dismissal of Vermont consumer protection claim where plaintiff was not a "consumer" because she did not purchase medical device for personal use, but "was prescribed the medical device by her doctor").

reliance. Those are counts 10 (Arkansas), 12 (California’s UCL), 18 (Georgia’s FBPA), 31 (Michigan), 38 (Nevada), and 48 (Pennsylvania).¹³

F. Five of the Claims Fail Because Plaintiffs Do Not Allege Any Wrongdoing Within the State

Under five of the consumer protection statutes, at least some portion of the defendant’s alleged wrongdoing must have occurred within the state, and the mere presence in the state of an alleged victim is insufficient. For example, plaintiffs do not allege that defendants made any pricing decisions for their insulin products outside of the location of their corporate headquarters. Because plaintiffs do not allege any misconduct occurring within any particular jurisdiction, their claims under such consumer protection statutes must be dismissed. Those are counts 22

¹³ See, e.g., ARK. CODE § 4-88-113(f)(1)(A) (private citizens may sue under the Arkansas statute if they suffered loss “as a result of his or her reliance” on deceptive practices); *Dimas v. JPMorgan Chase Bank, N.A.*, 2018 WL 809508, at *9 (N.D. Cal. Feb. 9, 2018) (explaining that UCL claims predicated on misrepresentations require a demonstration of actual reliance); *Barge v. Bristol-Myers Squibb Co.*, 2009 WL 5206127, at *8 (D.N.J. Dec. 30, 2009) (noting that Georgia’s Fair Business Practices Act incorporates the reliance element of the common law tort of misrepresentation); *Kussy v. Home Depot U.S.A. Inc.*, 2006 WL 3447146, at *7 (E.D. Mich. Nov. 28, 2006) (a plaintiff asserting claims under the Michigan Consumer Protection Act “must show reliance”); *Taddeo v. Taddeo*, 2011 WL 4074433, at *5 (D. Nev. Sept. 13, 2011) (under Nevada statute, a plaintiff must show his “justifiable reliance upon the misrepresentation”); *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 221 (3d Cir. 2008) (“[A] private plaintiff pursuing a claim under [Pennsylvania’s consumer protection] statute must prove justifiable reliance.”).

(Illinois), 39 (New Hampshire), 42 (New York), 52 (Tennessee), and 59 (Wisconsin).¹⁴

G. Three of the Claims Fail Due to Plaintiffs' Failure to Comply with Other Procedural Requirements

Three statutes include procedural requirements that plaintiffs do not allege that they have complied with. In particular, certain statutes contain a pre-suit requirement that a class action suit must be approved by the state attorney general or a requirement that a complaint specifically allege rules or judicial decisions under which an alleged practice has been found to be deceptive. Due to plaintiffs'

¹⁴ See, e.g., *De David v. Alaron Trading Corp.*, 2015 WL 2208407, at *5 (N.D. Ill. May 7, 2015) (noting the requirement that “the circumstances that relate to the disputed transaction occur primarily and substantially in Illinois”); *Mueller Co. v. U.S. Pipe & Foundry Co.*, 2003 WL 22272135, at *6 (D.N.H. Oct. 2, 2003) (“In the absence of any alleged unfair method of competition or unfair or deceptive act or practice which took place within New Hampshire, the harm suffered by [plaintiff] within the state does not state a claim under [the New Hampshire statute].”); *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324-25 (N.Y. 2002) (“[T]o qualify as a prohibited act under [the New York consumer protection statute], the deception of a consumer must occur in New York”); *Encore Med., L.P. v. Jay Kennedy, D.C.*, 2013 WL 839838, at *30 (W.D. Pa. Mar. 6, 2013) (holding that “both the language of the [Tennessee Consumer Protection Act] and the jurisprudence of the Tennessee courts indicate that the [Act] prohibits only acts or practices occurring within Tennessee’s borders”); *Calnin v. Hillard*, 2008 WL 336892, at *13 (E.D. Wis. Feb. 5, 2008) (holding that the scope of the Wisconsin statute “is limited to publications in this state”).

failure to comply with such requirements, their claims under these statutes should be dismissed. Those are counts 24 (Iowa), 34 (Mississippi), and 45 (Ohio).¹⁵

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the RICO brief, the Court should dismiss Counts 7-60 of the Consolidated Amended Class Action Complaint.

¹⁵ See, e.g., IOWA CODE § 714H.7 (under provision of Iowa statute permitting a private right of action, a “class action lawsuit alleging a violation of this chapter shall not be filed with a court unless it has been approved by the attorney general”); *Humphrey v. CitiBank NA*, 2013 WL 5407195, at *6 (N.D. Miss. Sept. 25, 2013) (“Mississippi law is clear that failure to satisfy the prerequisite of an attempt at informal dispute resolution [through a settlement program approved by the state attorney general] is fatal to a [Mississippi Consumer Protection Act] claim.” (citation and internal quotation marks omitted)); *City of Findlay v. Hotels.com, L.P.*, 441 F. Supp. 2d 855, 863 (N.D. Ohio 2006) (dismissing claims under Ohio Consumer Sales Practices Act for failing to meet prerequisites requiring pleading of rule promulgated by the Ohio attorney general or Ohio case that found the practice deceptive).

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APPENDIX A

This Appendix summarizes grounds for dismissing claims under state consumer protection statutes (● = ground for dismissal). Further details and support for each ground for dismissal are provided in Appendix B.

		AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI
I.A. Not Unlawful for Company to Charge Any Particular Price for a Product		●	●	●	●	●	●	●	●	●	●	●	●
I.B. Claims Are Merely Cursory Recitations of Elements of Statute		●	●	●	●	●	●	●	●	●	●	●	●
I.C. Plaintiffs Do Not Allege Proximate Cause		●	●	●	●	●	●	●	●	●	●	●	●
I.D. Plaintiffs' Allegations Do Not Comply with Rule 9(b)		●	●	●	●	●	●	●	●	●	●	●	●
I.E. Damages are Merely Speculative		●	●	●	●	●	●	●	●	●	●	●	●
II.A. Lack of Article III Standing; No Named Plaintiff		●	●					●	●	●			●
II.B. No Named Plaintiff Purchased Product in State	Eli Lilly				●								
	Novo Nordisk						●						
	Sanofi												
II.C. Statutory Prohibition on Class Actions		●										●	
II.D. Lack of Privity/Direct Business Relationship				●						●			
II.E. Failure to Adequately Allege Reliance					●	●						●	
II.F. No Alleged Wrongdoing Within State													
II.G. Failure to Comply with Procedural Requirements													

	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS
I.A. Not Unlawful for Company to Charge Any Particular Price for a Product	●	●	●	●	●	●	●	●	●	●	●	●	●
I.B. Claims Are Merely Cursory Recitations of Elements of Statute	●	●	●	●	●	●	●	●	●	●	●	●	●
I.C. Plaintiffs Do Not Allege Proximate Cause	●	●	●	●	●	●	●	●	●	●	●	●	●
I.D. Plaintiffs' Allegations Do Not Comply with Rule 9(b)	●	●	●	●	●	●	●	●	●	●	●	●	●
I.E. Damages are Merely Speculative	●	●	●	●	●	●	●	●	●	●	●	●	●
II.A. Lack of Article III Standing; No Named Plaintiff									●				
II.B. No Named Plaintiff Purchased Product in State	Eli Lilly	●				●							●
	Novo Nordisk									●			
	Sanofi						●	●					●
II.C. Statutory Prohibition on Class Actions						●	●						●
II.D. Lack of Privity/Direct Business Relationship	●					●				●			
II.E. Failure to Adequately Allege Reliance											●		
II.F. No Alleged Wrongdoing Within State		●											
II.G. Failure to Comply with Procedural Requirements				●									●

		MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR
I.A. Not Unlawful for Company to Charge Any Particular Price for a Product		●	●	●	●	●	●	●	●	●	●	●	●	●
I.B. Claims Are Merely Cursory Recitations of Elements of Statute		●	●	●	●	●	●	●	●	●	●	●	●	●
I.C. Plaintiffs Do Not Allege Proximate Cause		●	●	●	●	●	●	●	●	●	●	●	●	●
I.D. Plaintiffs' Allegations Do Not Comply with Rule 9(b)		●	●	●	●	●	●	●	●	●	●	●	●	●
I.E. Damages are Merely Speculative		●	●	●	●	●	●	●	●	●	●	●	●	●
II.A. Lack of Article III Standing; No Named Plaintiff						●				●	●		●	
II.B. No Named Plaintiff Purchased Product in State	Eli Lilly							●						●
	Novo Nordisk	●			●									
	Sanofi													
II.C. Statutory Prohibition on Class Actions			●											
II.D. Lack of Privity/Direct Business Relationship														
II.E. Failure to Adequately Allege Reliance					●									
II.F. No Alleged Wrongdoing Within State						●			●					
II.G. Failure to Comply with Procedural Requirements												●		

	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
I.A. Not Unlawful for Company to Charge Any Particular Price for a Product	●	●	●	●	●	●	●	●	●	●	●	●	●
I.B. Claims Are Merely Cursory Recitations of Elements of Statute	●	●	●	●	●	●	●	●	●	●	●	●	●
I.C. Plaintiffs Do Not Allege Proximate Cause	●	●	●	●	●	●	●	●	●	●	●	●	●
I.D. Plaintiffs' Allegations Do Not Comply with Rule 9(b)	●	●	●	●	●	●	●	●	●	●	●	●	●
I.E. Damages are Merely Speculative	●	●	●	●	●	●	●	●	●	●	●	●	●
II.A. Lack of Article III Standing; No Named Plaintiff	●	●	●	●					●		●		●
II.B. No Named Plaintiff Purchased Product in State	Eli Lilly				●			●					
	Novo Nordisk									●			
	Sanofi				●					●			
II.C. Statutory Prohibition on Class Actions			●		●								
II.D. Lack of Privity/Direct Business Relationship								●					
II.E. Failure to Adequately Allege Reliance	●												
II.F. No Alleged Wrongdoing Within State					●							●	
II.G. Failure to Comply with Procedural Requirements													

APPENDIX B

Section I(A) - Not Unlawful for Company to Charge Any Particular Price for a Product	
All 50 States and the District of Columbia	<p><i>Bonilla v. Volvo Car Corp.</i>, 150 F.3d 62, 71-72, 76 (1st Cir. 1998)</p> <p><i>Kantner v. Merck & Co., Inc.</i>, 2007 WL 3092779, at ¶ 17 (Ind. Super. Ct. Apr. 18, 2007)</p> <p><i>Ford Motor Credit Co. v. Majors</i>, 2005 WL 1021551, at *7 (Minn. Ct. App. May 3, 2005)</p> <p><i>Turner v. Purina Mills, Inc.</i>, 989 F.2d 1419, 1422 (5th Cir. 1993)</p>
Section I(B) - Claims Are Merely Cursory Recitations of Elements of Statute	
All 50 States and the District of Columbia	<p><i>McGarvey v. Penske Auto. Grp., Inc.</i>, 639 F. Supp. 2d 450, 465-66 (D.N.J. 2009)</p> <p><i>In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.</i>, 2017 WL 4642285, at *14 (E.D. Pa. Oct. 17, 2017)</p>
Section I(C) - Plaintiffs Do Not Allege Proximate Cause	
All 50 States and the District of Columbia	<p><i>In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.</i>, 997 F. Supp. 2d 526, 546 (N.D. Tex. 2014)</p> <p><i>Martinelli v. Petland, Inc.</i>, 2010 WL 376921, at *8-9 (D. Ariz. Jan. 26, 2010)</p> <p><i>Lexmark Int'l, Inc. v. Static Control Components, Inc.</i>, 134 S. Ct. 1377, 1390 (2014)</p>

Section I(D) - Plaintiffs' Allegations Do Not Comply with Rule 9(b)	
All 50 States and the District of Columbia	<i>Frederico v. Home Depot</i> , 507 F.3d 188, 200 (3d Cir. 2007) <i>DeGennaro v. Am. Bankers Ins. Co. of Fla.</i> , 2017 WL 2693881, at *5 (D.N.J. June 22, 2017) (Martinotti, J.)

Section I(E) - Damages are Merely Speculative	
All 50 States and the District of Columbia	<i>Prohias v. Pfizer, Inc.</i> , 485 F. Supp. 2d 1329, 1336-37 (S.D. Fla. 2009) <i>In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.</i> , 660 F. Supp. 2d 94, 100-01 (D. Me. 2009) <i>Kantner v. Merck & Co., Inc.</i> , 2007 WL 3092779, at ¶¶ 17-19 (Ind. Super. Ct. Apr. 18, 2007)

Section II(A) - Lack of Article III Standing Due to the Absence of Any Named Plaintiff	
Alabama	<i>Winer Family Trust v. Queen</i> , 503 F.3d 319, 325 (3d Cir. 2007)
Alaska	
Connecticut	<i>In re Schering Plough Corp. Intron/Temodar Consumer Class Action</i> , 678 F.3d 235, 243-45 (3d Cir. 2012)
Delaware	
District of Columbia	
Hawaii	<i>Lewis v. Casey</i> , 518 U.S. 343, 357 (1996)
Maryland	
New Hampshire	<i>Neale v. Volvo Cars of N. Am., LLC</i> , 794 F.3d 353, 360, 366-67 (3d Cir. 2015)
North Carolina	
North Dakota	<i>Plumbers Local Union No. 690 Health Plan v. Apotex Corp.</i> , 2017 WL 4235773, at *13 (E.D. Pa. Sept. 25, 2017)
Oklahoma	
Pennsylvania	<i>In re: Niaspan Antitrust Litig.</i> , 2015 WL 8150588, at *3 (E.D. Pa. Dec. 8, 2015)
Rhode Island	
South Carolina	<i>In re Flonase Antitrust Litig.</i> , 692 F. Supp. 2d 524, 533 (E.D. Pa. 2010)
South Dakota	
Virginia	
West Virginia	
Wyoming	

Section II(B) – No Named Plaintiff Purchased Defendant’s Product in State, so No Injury in that State		
Eli Lilly	Arkansas	<i>Liebersen v. Johnson & Johnson Consumer Cos., Inc.</i> , 865 F. Supp. 2d 529, 537 (D.N.J. 2011) <i>Green v. Green Mountain Coffee Roasters, Inc.</i> , 279 F.R.D. 275, 280 (D.N.J. 2011)
	Illinois	
	Kentucky	
	Mississippi	
	New Mexico	
	Oregon	
	Tennessee	
	Vermont	
Novo Nordisk	Colorado	<i>Liebersen v. Johnson & Johnson Consumer Cos., Inc.</i> , 865 F. Supp. 2d 529, 537 (D.N.J. 2011) <i>Green v. Green Mountain Coffee Roasters, Inc.</i> , 279 F.R.D. 275, 280 (D.N.J. 2011)
	Massachusetts	
	Missouri	
	Nevada	
	Washington	
Sanofi	Louisiana	<i>Liebersen v. Johnson & Johnson Consumer Cos., Inc.</i> , 865 F. Supp. 2d 529, 537 (D.N.J. 2011) <i>Green v. Green Mountain Coffee Roasters, Inc.</i> , 279 F.R.D. 275, 280 (D.N.J. 2011)
	Maine	
	Mississippi	
	Tennessee	
	Washington	

Section II(C) – Statutory Prohibitions on Class Actions	
Alabama	ALA. CODE § 8-19-10(f) <i>Delgado v. Ocwen Loan Servicing, LLC</i> , 2017 WL 5201079, at *9-11 (E.D.N.Y. Nov. 9, 2017)
Georgia (Fair Business Practices Act)	O.C.G.A. § 10-1-399(a) <i>Delgado v. Ocwen Loan Servicing, LLC</i> , 2017 WL 5201079, at *9-11 (E.D.N.Y. Nov. 9, 2017)
Kentucky	<i>In re Target Corp. Customer Data Sec. Breach Litig.</i> , 66 F. Supp. 3d 1154, 1164-66 (D. Minn. 2014)
Louisiana	LA. REV. STAT. § 51:1409(A) <i>In re Target Corp. Customer Data Sec. Breach Litig.</i> , 66 F. Supp. 3d 1154, 1164-66 (D. Minn. 2014)
Mississippi	MISS. CODE § 75-24-15(4) <i>In re Target Corp. Customer Data Sec. Breach Litig.</i> , 66 F. Supp. 3d 1154, 1164-66 (D. Minn. 2014)
Montana	MCA § 30-14-133(1) <i>In re Target Corp. Customer Data Sec. Breach Litig.</i> , 66 F. Supp. 3d 1154, 1164-66 (D. Minn. 2014)
South Carolina	S.C. CODE § 39-5-140(a) <i>In re Target Corp. Customer Data Sec. Breach Litig.</i> , 66 F. Supp. 3d 1154, 1164-66 (D. Minn. 2014)
Tennessee	TENN. CODE § 47-18-109(a)(1) <i>Delgado v. Ocwen Loan Servicing, LLC</i> , 2017 WL 5201079, at *9-11 (E.D.N.Y. Nov. 9, 2017)

Section II(D) – Lack of Privity or Direct Business Relationship with Defendants

Arizona	<i>Sutter Home Winery, Inc. v. Vintage Selections, Ltd.</i> , 971 F.2d 401, 407 (9th Cir. 1992)
District of Columbia	<i>Robinson v. Deutsche Bank Nat’l Tr. Co.</i> , 932 F. Supp. 2d 95, 102-03 (D.D.C. 2013)
Idaho	<i>Taylor v. McNichols</i> , 243 P.3d 642, 662 (Idaho 2010)
Kentucky	<i>Tallon v. Lloyd & McDaniel</i> , 497 F. Supp. 2d 847, 854-55 (W.D. Ky. 2007)
Massachusetts	<i>John Boyd Co. v. Bos. Gas Co.</i> , 775 F. Supp. 435, 440 (D. Mass. 1991)
Vermont	<i>Otis-Wisher v. Medtronic, Inc.</i> , 616 F. App’x 433, 435 (2nd Cir. 2015)

Section II(E) – Failure to Adequately Allege Reliance

Arkansas	ARK. CODE § 4-88-113(f)(1)(A)
California (Unfair Competition Law)	<i>Dimas v. JPMorgan Chase Bank, N.A.</i> , 2018 WL 809508, at *9 (N.D. Cal. Feb. 9, 2018)
Georgia (Fair Business Practices Act)	GA. CODE ANN. § 10-1-399(b) <i>Barge v. Bristol-Myers Squibb Co.</i> , 2009 WL 5206127, at *8 (D.N.J. Dec. 30, 2009)
Michigan	<i>Kussy v. Home Depot U.S.A. Inc.</i> , 2006 WL 3447146, at *7 (E.D. Mich. Nov. 28, 2006)
Nevada	<i>Taddeo v. Taddeo</i> , 2011 WL 4074433, at *5 (D. Nev. Sept. 13, 2011)
Pennsylvania	PA. CONS. STAT. § 201-9.2(a) <i>Hunt v. U.S. Tobacco Co.</i> , 538 F.3d 217, 221 (3d Cir. 2008)

Section II(F) – No Alleged Wrongdoing Within the State	
Illinois	<i>De David v. Alaron Trading Corp.</i> , 2015 WL 2208407, at *5 (N.D. Ill. May 7, 2015)
New Hampshire	N.H. REV. STAT. § 358-A:2 <i>Mueller Co. v. U.S. Pipe & Foundry Co.</i> , 2003 WL 22272135, at *6 (D.N.H. Oct. 2, 2003)
New York	N.Y. GEN. BUS. LAW § 349(a) <i>Goshen v. Mut. Life Ins. Co. of N.Y.</i> , 98 N.Y.2d 314, 324-25 (N.Y. 2002)
Tennessee	TENN. CODE ANN. § 47-18-102(2) <i>Encore Med., L.P. v. Jay Kennedy, D.C.</i> , 2013 WL 839838, at *30 (W.D. Pa. Mar. 6, 2013)
Wisconsin	WIS. STAT. § 100.18(1) <i>Calnin v. Hillard</i> , 2008 WL 336892, at *13 (E.D. Wis. Feb. 5, 2008)

Section II(G) – Failure to Comply with Procedural Requirements	
Iowa	IOWA CODE § 714H.7
Mississippi	<i>Humphrey v. CitiBank NA</i> , 2013 WL 5407195, at *6 (N.D. Miss. Sept. 25, 2013)
Ohio	<i>City of Findlay v. Hotels.com, L.P.</i> , 441 F. Supp. 2d 855, 863 (N.D. Ohio 2006)